FILED
DEC 21 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 98-830

In The

Supreme Court of the United States

October Term, 1998

AMOCO PRODUCTION COMPANY,
on behalf of itself and the class it represents,

Petitioners,

v.

SOUTHERN UTE INDIAN TRIBE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION

THOMAS H. SHIPPS*
FRANK E. MAYNES
MAYNES, BRADFORD, SHIPPS & SHEFTEL, LLP
P.O. Box 2717
Durango, CO 81302
(970) 247-1755

MICHAEL T. MCCONNELL
LONG & JAUDON
1600 Ogden Street
Denver, CO 80218-1414
(303) 832-1122

SCOTT B. MCELROY
ALICE E. WALKER
GREENE, MEYER & MCELROY, P.C.
1007 Pearl Street, Suite 220
Boulder, CO 80302
(303) 442-2021

Counsel for Respondent Southern Ute Indian Tribe

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether the United States retained ownership of the coalbed methane inherently contained in underground coal when Congress reserved "coal deposits" to the United States in lands subject to limited, agricultural patents under the 1909 and 1910 Coal Land Entry Acts, 30 U.S.C. §§ 81, 83-85.

2. Whether the Court of Appeals erred under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), in not affording binding deference to a 1981 Department of the Interior Solicitor's opinion that: (1) was rendered without public notice-and-comment; (2) was found by the Court of Appeals to be arbitrary; (3) did not address the precise issue before the court; and (4) was not treated as binding by the Department of the Interior on the question before the court.

PARTIES TO THE PROCEEDING

The petition does not accurately list the parties to the proceeding. The petition lists Tiffany Gas Company as the sole defendant who was not an appellee below.

As a result of settlements reached and related orders of dismissal entered prior to the filing of plaintiff's interlocutory appeal below, the following named defendants and unnamed members of the defendant class, listed in chronological order of dismissal, were also not appellees: MarkWest Energy Partners, Ltd.; McKenzie Methane Corporation; SG Interests II, Ltd; Union Texas Petroleum Corporation; Union Texas Petroleum Energy Corporation; Conoco, Inc.; SG Interests I, Ltd.; Bellsouth Corporation Health Care Trust; Pablo Operating Company; Patricia Penrose Schieffer, individually and as Successor Trustee of the Patricia Penrose Schieffer Testamentary Trust; J. Thomas Schieffer, individually and as attorney-in-fact for the Patricia Penrose Schieffer Testamentary Trust; Greta B. Layton Schutt, Mercantile-Safe Deposit & Trust Company, Charles T. Peters, Jacques T. Schlenger, individually and as Co-Trustees of the Donaldson Brown Trust of March 25, 1965; Palo Petroleum, Inc.; and Meridian Oil Inc.

Following the filing of plaintiff's appeal below, but prior to the entry of judgment, the following defendants also reached settlement with the plaintiff and were dismissed from the proceeding: Anthony F. Zarlengo and Emerald San Juan Company, L.P.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	v
STATEMENT OF THE CASE	1
A. FACTUAL BACKGROUND	2
1. COAL AND COALBED METHANE	2
2. THE TRIBE'S RESERVATION AND EMERGENCE OF CBM AS A COMMERCIAL RESOURCE	3
3. FORMULATON OF THE 1981 SOLICITOR'S OPINION	5
B. THE DISTRICT COURT PROCEEDINGS	8
C. THE PANEL DECISION	9
D. THE DECISION EN BANC	12
REASONS FOR DENYING THE WRIT	13
I. THE COURT OF APPEALS' DECISION DOES NOT HAVE NATIONAL IMPACT JUSTIFYING REVIEW BY THIS COURT	13
A. THE ENZI ACT DISCLAIMED FEDERAL PROPRIETARY INTERESTS TO CBM AND ELIMINATED ANY NEED FOR REVIEW	14
B. THE IMPACT ON THE PARTIES TO THE CASE DOES NOT JUSTIFY INTERLOCUTORY REVIEW OF THE DECISION	18

TABLE OF CONTENTS – Continued

Page

II. UNDER THE CIRCUMSTANCES OF THIS CASE, THE 1981 SOLICITOR'S OPINION WAS NOT ENTITLED TO BINDING DEFERENCE UNDER *CHEVRON* 20

III. THE COURT OF APPEALS CORRECTLY HELD THAT CONGRESS DID NOT CONVEY CBM TO AGRICULTURAL ENTRYMEN UNDER THE 1909 AND 1910 ACTS 22

CONCLUSION 30

APPENDICES:

Act of March 3, 1909, 35 Stat. 844 ("1909 Act") 1a

Act of June 22, 1910, 36 Stat. 583 ("1910 Act") 3a

Pub. L. No. 105-367 ("Enzi Act") 6a

Bureau of Mines, Bulletin 65 (1913) (cover page) 9a

Bureau of Mines, Bulletin 65, Plate I (map) 10a

TABLE OF AUTHORITIES

Page

CASES

Burke v. Southern Pac. R.R. Co., 234 U.S. 669 (1914) .. 10, 26

Carbon County v. Union Reserve Coal Co., 898 P.2d 680 (Mont. 1995) 17

Chapman v. United States, 500 U.S. 453 (1991) 24

Chevron U.S.A. Inc. v. Natural Resources Defense Council Inc., 467 U.S. 837 (1984) 1, 11, 13, 20, 21, 22

Kiowa Tribe of Oklahoma v. Manufacturing Tech., Inc., 118 S. Ct. 1700 (1998) 16

Leo Sheep Co. v. United States, 440 U.S. 668 (1979) 21

Martin v. Occupational Safety and Health Review Comm'n, 499 U.S. 144 (1991) 20

Metropolitan Stevedore Co. v. Rambo, 117 S. Ct. 1953 (1997) 20

Muscarello v. United States, 118 S. Ct. 1911 (1998) 24

NCNB Texas Nat'l Bank, N.A. v. West, 631 So.2d 212 (Ala. 1993) 17

Rayburn v. USX Corp., No. CIV. A. 85-G-2661-W, 1987 WL 470907 (N.D. Ala. Jul. 28, 1987) 17

Skidmore v. Swift & Co., 323 U.S. 134 (1944) ... 1, 12, 21

Smiley v. Citibank (South Dakota), N.A., 517 U.S. 735 (1996) 20

United States Steel Corp. v. Hoge, 468 A.2d 1380 (Pa. 1983) 7, 17

United States v. Bass, 404 U.S. 336 (1971) 24

United States v. Fisher, 6 U.S. (2 Cranch) 358 (1805) 24

TABLE OF AUTHORITIES – Continued

Page

Vines v. McKenzie Methane Corp., 619 So.2d 1305 (Ala. 1993) 17

Virginia Military Inst. v. United States, 508 U.S. 946 (1993) 16

Watt v. Western Nuclear, Inc., 462 U.S. 36 (1983) 10

STATUTES

25 U.S.C. §§ 396a-396g 3

25 U.S.C. §§ 2101-2108 3

Act of March 3, 1909, ch. 270, 35 Stat. 844 (codified at 30 U.S.C. § 81) ..... *passim*

Act of June 22, 1910, ch. 318, 36 Stat. 583 (codified at 30 U.S.C. §§ 83-85) ..... *passim*

Act of May 21, 1984, Pub. L. No. 98-290, 98 Stat. 201 3

Enzi Act, Pub. L. No. 105-367, 112 Stat. 3313 (1998) 13

§ 1(b)(1) 15

§ 1(b)(3) 15

§ 1(b)(4) 14

OTHER AUTHORITIES

144 CONG. REC. S10595 (daily ed. Sept. 18, 1998) ..14, 16

IV THE AMERICAN CYCLOPAEDIA: A POPULAR DICTIONARY OF GENERAL KNOWLEDGE 726 (G. Ripley and C. A. Dana, eds. 1883) 24

TABLE OF AUTHORITIES – Continued

Page

Andrew R. Scott, et al., *Thermogenic and Secondary Biogenic Gases, San Juan Basin, Colorado and New Mexico – Implications for Coalbed Gas Producibility*, 78 AMERICAN ASSOCIATION OF PETROLEUM GEOLOGISTS BULLETIN 1186, 1195 (1994) 29

VI ENCYCLOPAEDIA BRITANNICA 575 (11th ed. 1910) 28

George S. Rice, et al., *Oil and Gas Wells Through Workable Coal Beds*, BUREAU OF MINES BULL. 65 (1913) 27

John P. Seidle (Amoco Tech. Ctr.), *Coalbed Methane: A Unique Resource* (1995) 29

John P. Seidle and Luis E. Arri (Amoco Prod. Co.), *Use of Conventional Reservoir Models For Coalbed Methane Simulation*, SOCIETY OF PETROLEUM ENGINEERS, Paper No. 21599 (1990) 29

Ownership of and Right to Extract Coalbed Gas in Federal Coal Deposits, No. M-36935, 88 Interior Dec. 538 (1981) 5

The Potential Economic Impacts of the Coal-Bed Methane Dispute in La Plata County, Colorado 1 (School of Business Admin., Ft. Lewis College 1997) 19

Richard A. Schraufnagel and Paul S. Schafer, *The Success of Coalbed Methane, reprinted in A Guide to Coalbed Methane Engineering* (1995) 4

Rights to Coalbed Methane Under an Oil & Gas Lease for Lands in the Jicarilla Apache Reservation, No. M-36970, 98 Interior Dec. 59 (1990) 7

"WIC Targets Coal-bed Gas With Medicine Bow," Daily Gas Price Index (Dec. 4, 1998) 14

8 WILLIAMS & MEYERS, OIL AND GAS LAW, *Rule of Capture* 983 (1996) 28

STATEMENT OF THE CASE

Petitioners seek review of the decision of the Tenth Circuit Court of Appeals holding that Respondent Southern Ute Indian Tribe ("Tribe") owns the coalbed methane ("CBM") inherently part of the Tribe's underground coal deposits (Pet.App. 1a-51a). Petitioners also ask the Court to review the Court of Appeals' ruling that an opinion of the Solicitor of the Department of the Interior was not entitled to deference under either *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), or *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944) (Pet.App. 52a-94a). Although this case has been pending for seven years, the decisions below complete only a preliminary phase of the case, and on remand, the District Court will be required to consider defenses raised by Petitioners to defeat recovery by the Tribe, a claim by the Federal Defendants that they are indispensable parties against whom the case is barred by a statute of limitation, as well as possible declaratory, injunctive and compensatory remedies associated with the Tribe's claims for trespass.

In making its decision, the Court of Appeals construed the 1909 and 1910 Coal Land Entry Acts and the scope of the coal estates and non-coal estates severed thereunder. Act of March 3, 1909, ch. 270, 35 Stat. 844 (codified at 30 U.S.C. § 81) ("1909 Act"); Act of June 22, 1910, ch. 318, 36 Stat. 583 (codified at 30 U.S.C. §§ 83-85) ("1910 Act") (together "the Acts").[1] The Acts, which in

---

[1] Codified versions of the 1909 Act and the 1910 Act are reprinted in the Appendix to Petition for Certiorari ("Pet.App.") 133a-136a. Copies of the Acts as originally printed in the Statutes at Large are set forth in the Appendix to Respondent's Brief in Opposition ("R.App.") 1a-5a.

this case apply to approximately 200,000 acres of land within the Southern Ute Indian Reservation ("Reservation"), permitted agricultural settlers for the first time to enter upon federal lands known to contain valuable coal deposits, which lands previously had been off-limits to agricultural patenting. The 1909 Act conditioned non-mineral entry onto certain designated coal lands upon the settlers making a statutory election to receive limited patents, which reserved to the United States "all coal in said lands, and the right to prospect for, mine, and remove the same." (Pet.App. 133a). The 1910 Act expanded the designated coal lands open for agricultural patenting, subject to a reservation of coal estates on terms effectively identical to those set forth in the 1909 Act (Pet.App. 135a). Even though Petitioners admittedly own no interest in the "coal deposits" expressly reserved under the Acts and now owned by the Tribe, Petitioners claim absolute rights to drill into the Tribe's coal, to inject fracturing agents under tremendous pressure to crack the coal, and to extract CBM trapped in the micropores of the underground coal deposits, in short, to destroy the coal (Pet.App. 19a n.10 (describing CBM production techniques)).

A. Factual Background

1. Coal and Coalbed Methane

The Tribe's Reservation contains vast bituminous coal beds created through the geologic process of coalification which transformed the fossilized remains of forests

into coal. Like the ancient forests from which they developed, these coal deposits are a diverse and complex mixture of a multitude of substances stratified under tremendous weight and pressure. Many of coal's constituents, when removed from the coal and brought to the surface, are considered to be liquids or gases. Among coal's constituents are hydrocarbons. One such hydrocarbon is bitumen – a liquid; another is methane – a gas. There are dozens more.

2. The Tribe's Reservation and Emergence of CBM as a Commercial Resource

The Tribe's Reservation is a remnant of its aboriginal lands now comprising approximately 700,000 acres of land held in checkerboarded and severed ownerships. *See* Act of May 21, 1984, Pub. L. No. 98-290, 98 Stat. 201 (confirming exterior boundaries of Reservation). The Reservation is located in southwestern Colorado on the northern edge of the San Juan Basin. Since the late 1940's, the Reservation has been an area of active conventional oil and gas exploration. Extensive conventional natural gas production has occurred within three geologic formations located beneath the Tribe's coal.

Historically, Reservation oil and gas development was undertaken by companies who leased oil and gas lands from private landowners or, in some cases, from the Tribe under the active supervision of the Department of the Interior ("Department") pursuant to federal law. *See* 25 U.S.C. §§ 396a-396g; 25 U.S.C. §§ 2101-2108. Prior to 1985, the Tribe depended almost entirely on the Bureau of Indian Affairs ("BIA") and Bureau of Land Management

("BLM") for technical assistance and for ensuring oil and gas lease compliance. Concerned that those agencies lacked the resources to manage tribal resources properly, the Tribe in 1974 halted the leasing of its lands. However, ongoing drilling and production activities under pending leases and pooling arrangements between operating companies continued to require active federal management. Although the Tribe opened a one-man energy office in the spring of 1980, tribal oil and gas leasing did not resume until 1986, with the development of a tribal technical staff.

In the early 1980s, when the Tribe was taking its first steps into the world of energy resource development, the Department of Energy and the Bureau of Mines were already engaged in experimental development of CBM, a new, non-conventional resource. At that time, "much of the natural gas industry considered coalbed methane to be nothing more than a coal mining industry problem." Richard A. Schraufnagel and Paul S. Schafer, *The Success of Coalbed Methane, reprinted in A Guide to Coalbed Methane Engineering* 1.2 (1995). Although the presence of large volumes of gas naturally trapped in coal had been known and commented upon for hundreds of years, commercial CBM extraction and development were impractical because of the limited permeability of coal and the universal presence of water in coal.

Oil companies understood that development of CBM raised serious questions regarding its ownership. As early as 1975, Amoco's own lawyers advised that prior to commencing CBM extraction, Amoco should "obtain from the owner of the coal rights authority to conduct

these operations." Amoco Memorandum from H.O. Hickman to Leo M. Brady at 2 (Aug. 27, 1975), *Tribe's Cross Motion for Summary Judgment* Exhibit 5-A (Sept. 7, 1993). Amoco's failure to follow that advice ultimately resulted in the present litigation.

3. Formulation of the 1981 Solicitor's Opinion

The issue identified by Amoco's counsel assumed far greater urgency when several years later the United States Geological Survey ("USGS") denied Amoco's request to drill CBM wells under the authority of federal oil and gas leases on federal lands in other parts of Colorado and Wyoming. This denial eventually led to issuance of an opinion by the Solicitor for the Department suggesting that CBM on federal lands should be developed under federal oil and gas leases rather than coal leases. *Ownership of and Right to Extract Coalbed Gas in Federal Coal Deposits*, No. M-36935, 88 Interior Dec. 538 (1981) ("1981 Solicitor's opinion") (*reprinted in* Pet.App. 140a-159a.).

Petitioners decline to mention their involvement in procuring the 1981 Solicitor's opinion on which they now place such great reliance (Pet.App. 158a). Following the USGS's denial of Amoco's CBM drilling requests, Amoco sought to reverse the decision within the Department. Aplt.App. at 2038.[2] Although Amoco filed its appeals

---

[2] "Aplt.App." refers to Appellant's Appendix filed by the Tribe with its opening brief before the Tenth Circuit panel on March 27, 1995. As the pages in the Aplt.App. are sequential, the Tribe refers herein to the page number in the Aplt.App. when

with the Interior Board of Land Appeals, the Solicitor took up the issue. During the Solicitor's consideration, Amoco sent a telegram and letter to the Secretary of the Interior and Amoco's public affairs director wrote a "personal and confidential" letter to the BLM Director supporting Amoco's position. Aplt.App. at 2051, 2055, 2059. Amoco also filed a lawsuit against the Department, having confidentially described the case as a "friendly lawsuit" in its letter to the BLM Director. Aplt.App. at 638, 2059. Shortly after Amoco filed its lawsuit, the Solicitor issued his opinion construing the 1909 and 1910 Acts as Amoco wished. At the request of the Secretary, the Solicitor sent the opinion to Amoco, along with his apologies for the "delay" in its issuance. Aplt.App. at 2061. Amoco then dismissed its lawsuit against the Department. In contrast to Amoco's participatory role, there was no tribal involvement with the Department in the opinion's preparation. Nor is there any evidence that those within the Department charged with the responsibility for the protection of tribal interests played any role whatsoever.

The issuance of the 1981 Solicitor's opinion, however, did not eliminate the uncertainties over CBM ownership. As Amoco's lawyers recognized:

> The presence of segregated coal interests also increases business risk. This situation arises when a divided coal interest is created by a patent reservation . . . . In order to reduce the likelihood of subsequent litigation, the preeminence of potentially competitive claims (coal versus oil and gas) should be settled between the claimants in advance of drilling. Failure to do so may result in loss of the investment . . . .

referencing documents in the record before the Court of Appeals.

Aplt.App. at 1432. Additionally, title opinions written in anticipation of drilling into tribal coal deposits regularly warned Amoco and other company defendants that, despite the 1981 Solicitor's opinion, ownership of CBM remained uncertain (Pet.App. 80a n.20). Rather than settling the Tribe's "competitive claims" in "advance of drilling" as advised, Petitioners chose to proceed and assume the risk of invalid title. Indeed, even when the Pennsylvania Supreme Court reversed the lower court decision on which the Solicitor had placed substantial reliance in his 1981 opinion, Amoco did not blink at going forward. *See United States Steel Corp. v. Hoge*, 468 A.2d 1380, 1384 (Pa. 1983) ("[T]he coal owner may mine his coal, extract the gas from it, or both.").

Certainly, the Department never viewed the 1981 Solicitor's opinion as determinative of the ownership issue on tribal lands. Nothing in the opinion expressly stated that it applied to tribal lands, and on the Reservation, the BIA routinely did not apply the opinion to the Tribe's mineral interests.[3] For example, the Tribe through

[3] In 1990, the Solicitor applied the portions of his 1981 opinion discussing the relationship of CBM to coal to conclude that tribal leases granting the right to develop oil and gas were sufficient to grant rights to develop CBM where the Tribe owned the entire mineral estate. *Rights to Coalbed Methane Under an Oil & Gas Lease for Lands in the Jicarilla Apache Reservation*, No. M-36970, 98 Interior Dec. 59 (1990) (*reprinted in* Pet.App. 160a-177a). That opinion did not, however, address 1909 and 1910 Act lands.

its energy resource office requested that communitization agreements between tribal lessees and lessees of lands involved in this case expressly reserve the Tribe's right to CBM in severed coal estates. Commencing in 1988, the Department approved 162 communitization agreements signed by oil and gas companies and reserving the Tribe's rights to CBM. Aplt.App. at 2072, 2073; Supp.App. at 455.[4]

B. The District Court Proceedings

Shortly after the filing of this case, the District Court certified a defendant class consisting of all persons, other than governmental entities, claiming an interest in CBM underlying lands patented within the Reservation pursuant to the 1909 and 1910 Acts. The District Court bifurcated the case and defined two threshold issues: first, the Tribe's statutory ownership claim ("Class Action Claim"); and, second, the existence and applicability of a variety of defenses assertedly common to all members of the defendant class raised as a bar to the Tribe's Complaint ("Class Action Defenses"). Discovery proceeded solely on those two threshold questions. With the exception of those issues, the District Court stayed "all discovery and all other proceedings in this action (including the filing of cross-claims and counterclaims, the determination of the Tribe's remedies, if any . . . [and] the assertion of individual defenses . . . .)." Aplt.App. at 180-81. The District Court has never lifted that stay. The District Court also

---

[4] "Supp.App." refers to the Supplemental Appendix filed with Appellee's response brief before the Tenth Circuit panel on May 19, 1995.

issued an order addressing interim activities on the lands affected by this lawsuit allowing existing activities to continue free of any claim of bad faith trespass or punitive damages and setting conditions to protect those who engage in new activities from certain tribal claims. Aplt.App. at 259-64. Until the District Court amends the case management orders, producing companies are assured good faith trespasser status for ongoing operations. Aplt.App. at 570-75.

Following limited discovery, the parties filed cross motions for summary judgment on the two bifurcated issues. On September 13, 1994, the District Court entered summary judgment resolving the Class Action Claim against the Tribe and in favor of the named defendants and defendant class (Pet.App. 95a-132a). The District Court did not rule on the Class Action Defenses. In addition, the District Court did not address the Federal Defendants' argument that a statute of limitation barred the case against them (Pet.App.130a-131a). In declining to dismiss the Federal Defendants, the District Court noted that, because some duty might require federal mitigation of damage to coal strata, the court's decision on ownership did not dispose of the entire case against them: "other issues concerning these defendants remain for a later day." (Pet.App. 131a). The Tribe appealed.

C. The Panel Decision

The three-judge appellate panel began its analysis by reviewing the relevant statutory language (Pet.App. 60a). The panel considered and rejected Petitioners' contention that the text of the Acts revealed a specific congressional

intent to convey CBM to agricultural entrymen (Pet.App. 61a-66a). Instead, the panel concluded that "the text of these acts gives us no particular indication of Congress' *specific intent* with regard to [CBM]." (Pet.App. 65a). The panel then examined the general purposes of the grant and reservation through analyses of the enactments' historical context and legislative histories (Pet.App. 66a-77a). The panel concluded that Congress passed the Acts to accommodate two competing national interests: alleviation of the hardship to settlers resulting from the withdrawal of increasing amounts of coal land from agricultural entry; and congressional intent to preserve "both the present and future economic value of coal," including the value that might be realized under future technology (Pet.App. 66a-77a).

The panel then turned to the rule this Court has employed repeatedly over the last century to resolve ambiguities in public land laws, that " '*nothing passes except what is conveyed in clear language*' " and that " 'ambiguity or uncertainty in the terms employed [in land grants] should be resolved in favor of the government.' " (Pet.App. 59a (quoting *Watt v. Western Nuclear, Inc.*, 462 U.S. 36, 59 (1983); *Burke v. Southern Pac. R.R.*, 234 U.S. 669, 680 (1914)). In the absence of a specific intent to convey CBM, and because retention of CBM was consistent with the general purposes of the Acts, the panel employed the rule of public land law construction to suggest that "CBM trapped in coal is included in the reservation of coal to the United States." (Pet.App. 76a (footnote omitted)).

The panel did not end its analysis at that point, however. Instead the panel engaged in a "discriminating

analysis" of whether *Chevron* or general principles of deference required the court to adopt the interpretation of the Acts reflected in the 1981 Solicitor's opinion (Pet.App. 78a). Noting that the 1981 Solicitor's opinion had been "promulgated without notice and comment" and that adherence to the opinion in this case would have a "retroactive impact on private rights" conveyed decades before its promulgation, the panel questioned "whether this is the sort of decision *Chevron* is meant to enshrine." (Pet.App. 78a, 80a (footnote omitted)). In addressing that question, the panel initially assumed for purposes of its analysis that Congress had delegated to the Department the authority to issue binding interpretive decisions in its administration of lands subject to the Acts.[5] After reviewing existing case law, the panel concluded that in order to obtain binding force under *Chevron*, an agency's formulation of an interpretive decision must provide the procedural protections inherent in agency legislative rulemaking or administrative adjudication (Pet.App. 83a-88a). Because promulgation of the 1981 Solicitor's opinion provided no procedural protections to persons who might otherwise be caught within the opinion's web, the panel determined that binding *Chevron* deference was not appropriate.

---

[5] Though assuming for purposes of its analysis that sufficient delegated authority existed for *Chevron* to be applicable, the panel found significant uncertainty in the actual scope of agency interpretive authority in this case where the lands were no longer public lands, but rather consisted exclusively of Indian and private non-Indian interests (Pet.App. 82a-84a n.22).

Nonetheless, in keeping with *Skidmore*, the panel evaluated the persuasiveness of the 1981 Solicitor's opinion. For a number of reasons, the panel concluded that the 1981 Solicitor's opinion was "arbitrary" and that it lacked the power to persuade, much less to control the panel's final decision (Pet.App. 92a). Specifically, the panel found that the Solicitor had failed to apply the "governing canon" of construction for resolving doubts in land grants (Pet.App. 90a). Having concluded that the 1981 Solicitor's opinion was not only arbitrary, but also in conflict with the general purposes of the Acts, the panel determined that the opinion was not persuasive under *Skidmore*. Thus, the panel reversed the district court's grant of summary judgment against the Tribe on the CBM ownership issue (Pet.App. 94a).

D. The Decision En Banc

The Court of Appeals granted Petitioners' motion for rehearing on the question of whether the term "coal" as used in the 1909 and 1910 Acts "unambiguously excludes or includes CBM." (Pet.App. 8a (footnote omitted)). While supplementing portions of the panel's opinion, the court adopted the panel's analysis as its own. The court specifically found that Petitioners' position in this case could be sustained only by ignoring the entire text of the statutes and by focusing on the single term "coal." (Pet.App. 15a). The opinion noted that a fair review of contemporaneous definitions of "coal" shows that in 1909 and 1910, coal was known to contain "CBM in an occluded state . . . . " (Pet.App. 18a). More technically, "by 1909, scientists understood that gas within coal was a

constituent of coal which was generated by the coalification process." (Pet.App. 19a n.12 (citation omitted)). The court also pointed out that most state courts which had considered the question in the context of private conveyances had also held that "ownership of CBM is in the coal owner." (Pet.App. 23a (citation omitted)). Sustaining the panel's finding of ambiguity and its construction of the Acts, the en banc opinion did not disturb the panel's analysis of the 1981 Solicitor's opinion.

REASONS FOR DENYING THE WRIT

The decision of the Court of Appeals does not warrant review by this Court. First, as a result of recent passage of Pub. L. No. 105-367, 112 Stat. 3313 (1998) ("Enzi Act") (R.App. 6a-8a), Congress has eliminated any potential for national disruption arising from the appeal court's ruling. The case remains one of only local significance. Second, the court's decision reflects an unremarkable application of *Chevron*. After careful scrutiny, the court found the 1981 Solicitor's opinion to be arbitrary and unreasoned. *Chevron* specifically excludes from binding deference those agency statutory interpretations that are impermissible or unreasonable. Third, the statutory text and the purposes of the enactments do not support Petitioners' strained interpretation of the Acts.

I. The Court of Appeals' Decision Does Not Have National Impact Justifying Review by This Court.

In requesting the Court to review this case in its present posture, Petitioners greatly exaggerate the

national significance of the decision below, largely because they underestimate the effect of the Enzi Act on CBM lands outside the Tribe's Reservation. Petitioners also claim that the impact on the parties to the case requires immediate review. But any impact on Petitioners arises only because those parties steadfastly ignored the normal practice in resource development to resolve ownership issues before production. In light of the passage of the Enzi Act and the history of CBM development, Petitioners' admonition that the Court must immediately resolve the ownership issue they have chosen to disregard for nearly two decades does not ring true.

A. The Enzi Act disclaimed federal proprietary interests to CBM and eliminated any need for review.

In response to concerns over the potential effect of the court's CBM ownership decision on federal lands, Congress recently passed the Enzi Act. While the legislation expressly does not apply to land within the Tribe's Reservation at issue in this case, Enzi Act § 1(b)(4), (R.App. 7a), under the Enzi Act, the United States relinquished any claim to CBM on lands patented under the 1909 and 1910 Acts where private leases or contracts authorize CBM development. As stated by the bill's sponsor, Senator Enzi, the legislation will "ensure that existing leases to produce methane . . . remain valid and that there is no future assertion of ownership by the Federal Government on these parcels." 144 CONG. REC. S10595 (daily ed. Sept. 18, 1998). Experience in the Powder River Basin of Wyoming already illustrates the effectiveness of the Enzi Act. *See "WIC Targets Coal-bed Gas With Medicine Bow," Daily Gas Price Index* (Dec. 4, 1998) (announcing $80.5 million pipeline project and stating, "Recent passage of federal legislation clarifying rights to drill for coal-bed methane gas under existing leases cleared the way for significant development of the Powder River Basin . . . .").

Petitioners claim that the exceptions set forth in the Enzi Act hinder its objective of avoiding disruption in CBM development. Petition 25-26. Although no court has yet had an opportunity to interpret the legislation, the exceptions found in the Enzi Act are not as significant as the Petitioners suggest. Where the federal government has already issued a coal lease, the Enzi Act does not resolve the competing claims of federal coal lessees and private CBM lessees. Enzi Act § 1(b)(3), (R.App. 7a). However, one would expect in such instances that, prior to initiating commercial production of CBM, the parties would either have reached a negotiated settlement or have filed a separate lawsuit. Petitioners have not identified even one such case in which a problem actually has arisen. Likewise, although the Enzi Act does not apply where a private CBM contract or lease has not yet been signed, Petitioners have not described a single instance where real and immediate disruption would arise based upon this exception in the legislation. *See* Enzi Act § 1(b)(1), (R.App. 7a). Petitioners' failure to point to any actual controversy stemming from the exceptions in the Enzi Act is telling in light of the fact that the panel's decision on CBM ownership was filed nearly 18 months ago.

Moreover, should disruption actually arise in connection with the limited federal CBM rights preserved by the

Enzi Act exceptions, Congress would in all likelihood address such matters. Senator Enzi has already promised that Congress would "pursue a more in-depth review" next year in order to "work out problems with future leases and with conflicting resource use issues." 144 CONG. REC. S10595 (daily ed. Sept. 18, 1998). As this Court stated last spring, "[t]he capacity of the Legislative Branch to address the issue by comprehensive legislation counsels some caution . . . ." *Kiowa Tribe of Okla. v. Manufacturing Tech., Inc.*, 118 S. Ct. 1700, 1705 (1998). The likelihood of legislative review of the Enzi Act's exceptions weighs against this Court's review of the Court of Appeals' decision, particularly given its interlocutory nature. *See Virginia Military Inst. v. United States*, 508 U.S. 946 (1993) (Scalia, J.) (commenting on general practice of awaiting finality in lower courts).

Even had Congress not passed the Enzi Act, the Court of Appeals' decision would not have resulted in the national disruption that Petitioners struggle to portray. While the court's decision clearly relates only to lands patented under the 1909 and 1910 Acts, Petitioners mistakenly argue to expand its effect to non-coal lands patented under other statutes. This error alone reduces by almost one-fourth the land that Amoco describes as potentially affected by this case. Petition 24 (referencing lands patented under the 1914 Act). Furthermore, CBM development is in its very early stages and remains reasonably isolated. Petitioners acknowledge that only 5% of the coal lands patented under the Acts are subject to private CBM leases. Petition 26. With the exception of the Black Warrior Basin in Alabama, all active CBM development is located in the Tenth Circuit, and more than 85%

of national CBM production is obtained from the San Juan Basin alone. Nonetheless, the mitigating effects of the Enzi Act in those few areas where CBM production is actually occurring on 1909 and 1910 Act lands has simply eliminated any national importance to the Court of Appeals' decision.

Petitioners also fail to recognize that the decision of the Court of Appeals is consistent with the majority rule developed by the highest courts of states in the context of private conveyances.[6] Contrary to the implications of Petitioners' argument, the existence of the majority rule for such conveyances has not interfered with the CBM industry. For example, in the Black Warrior Basin in Alabama, which is the second largest CBM producing basin in the United States, the courts have consistently concluded that the coal owner possesses the right to develop CBM. *Vines v. McKenzie Methane Corp.*, 619 So.2d 1305 (Ala. 1993); *Rayburn v. USX Corp.*, No. CIV. A. 85-G-2661-W, 1987 WL 470907 (N.D. Ala. July 28, 1987). Given the history of development where the majority rule was

---

[6] *NCNB Texas Nat'l Bank, N.A. v. West*, 631 So.2d 212 (Ala. 1993) (coal owner owns CBM contained in coal, and gas owner owns CBM which has migrated away from coal reservoir); *Vines v. McKenzie Methane Corp.*, 619 So.2d 1305 (Ala. 1993) (ownership of CBM included in grant of "all coal"); *United States Steel Corp. v. Hoge*, 468 A.2d 1380 (Pa. 1983) (coal owner owns CBM contained in coal); *see also Rayburn v. USX Corp.*, No. CIV. A. 85-G-2661-W, 1987 WL 470907 (N.D. Ala. Jul. 28, 1987) (coal owner is owner of right to explore for and to extract occluded CBM where grantor of deed retained only oil and gas rights). *But c.f. Carbon County v. Union Reserve Coal Co.*, 898 P.2d 680 (Mont. 1995) (right to extract CBM is with holder of gas exploration rights).

applied, Petitioners' suggestion that the Court of Appeals' decision will somehow turn the CBM industry upside down is not plausible.

B. The impact on the parties to the case does not justify interlocutory review of the decision.

Petitioners further assert that the disruption of CBM development on the lands involved in this case warrants review by the Court despite the fact that the case is far from over. During the course of this lawsuit while the Tribe's judicial challenge was pending, CBM development involving the disputed Reservation lands accelerated. Since the lawsuit was filed in 1991, at least 143 wells have been drilled involving lands that are the subject of the dispute. As a result, approximately ten times as much CBM was developed from lands involved in the controversy during the pendency of the lawsuit as in all the years preceding the court case. In fact, throughout the history of this dispute, the Petitioners have consistently refused to slow down their aggressive pursuit of the profits from CBM development in order to address the unresolved ownership issues. Only now, with an unfavorable decision from the Court of Appeals do they find the ownership issues of overwhelming significance requiring the prompt attention of this Court.

Petitioners have also refused to take steps to protect themselves from the adverse consequences of the Court of Appeals' decision. For example, Petitioners complain that the voluntary company suspension of royalty payments to a landowner/lessor in the wake of the decision has created a hardship for some given the reliance on

those payments. On May 8, 1992 – about six months after this case was filed – the Tribe requested an order suspending and escrowing royalty payments. Aplt.App. at 261. Petitioners universally opposed that suggestion, preferring to risk potential liability for improper payments as well as the curtailment of CBM production income in the future. Having convinced the District Court that royalty suspension was unnecessary at the outset of the litigation and long before many of the wells in question were drilled, it is improper for Petitioners to rely on alleged hardships caused by belated royalty suspension as a basis for interlocutory review.

Finally, although none of the governmental entities who are now the subject of Petitioners' concern ever sought to intervene in the litigation, Petitioners suggest that an adverse tax impact on local governments, particularly La Plata County, provides further support for the need to grant review. In making that argument, Petitioners ignore an independently-commissioned analysis that concluded that the impact of the Court of Appeals' decision on the local tax base would be minimal. *The Potential Economic Impacts of the Coal-Bed Methane Dispute in La Plata County, Colorado* 1 (School of Business Admin., Ft. Lewis College 1997) ("Local governments will lose a relatively small part of their property tax bases and also a small percentage of their property tax revenues.").

The Tribe does not deny that this case, like any other case that reaches this Court, is important to the litigants. The Tribe also does not doubt that the ruling of the Court of Appeals causes concern among those who did not anticipate that decision. But those are not reasons for this Court to review this case. Congress has demonstrated

that it is willing to ensure that those who are not parties to the case will be protected from any harsh impact resulting from the Court of Appeals' decision. As to the parties, this case is far from over. The willingness of Petitioners to embark on and escalate CBM development without a resolution of the ownership issue addressed by the Court of Appeals demonstrates the fallacy of their current demand for immediate resolution of the case by this Court in order to avoid adverse impact on the parties.

II. Under the Circumstances of this Case, the 1981 Solicitor's Opinion Was Not Entitled to Binding Deference Under *Chevron*.

Petitioners request the Court to resolve a "mature" and "deep split" in the circuits about how the formality of the process by which agencies interpret statutes affects the deference due such administrative interpretations under *Chevron*. Petition 21-23. For a variety of reasons, this case is not an appropriate vehicle for addressing the format requirements of *Chevron*, even assuming that the Court had not already provided the guidance needed to resolve any question among the circuits. *See, e.g., Metropolitan Stevedore Co. v. Rambo*, 117 S. Ct. 1953, 1963 n.9 (1997); *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 741 (1996); *Martin v. Occupational Safety and Health Review Comm'n*, 499 U.S. 144, 157 (1991).

In arguing for review, Petitioners ignore completely the Court of Appeals' holding that the "Solicitor's statutory interpretation of the 1909 and 1910 Acts is arbitrary." (Pet.App. 92a). Clearly under *Chevron*, the court owed no

deference to an administrative interpretation found to be fundamentally unreasoned.[7] Rather, Petitioners imply that the only basis for rejection of the 1981 Solicitor's opinion was the absence of "the 'procedural protections' of notice-and-comment rulemaking" or agency adjudication. Petition 21-22 (quoting Pet.App. 87a). In fact, the court carefully considered the Solicitor's reasoning in holding that the opinion was an impermissible statutory interpretation.[8]

In concluding that the 1981 Solicitor's opinion was entitled to no deference under either *Chevron* or *Skidmore*, the court observed that "[r]easoned decisionmaking does not omit without explanation potentially determinative factors." (Pet.App. 93a). Significantly, the Solicitor's

---

[7] The Federal Defendants did not petition for certiorari. They advised the Court of Appeals that the Solicitor had commenced "a review of the analysis" in the 1981 Solicitor's opinion. *Response for the Federal Appellees* at 4 (Feb. 23, 1998). In their own words, "[t]hat review is ongoing and could conceivably result in a modification of the views expressed therein." *Id.*

[8] The Solicitor, though calling attention to the "well-established principle that nothing passes in a public land grant by implication . . . ," found the rule of construction inapplicable because of a perceived absence of ambiguity in Congress' grant of CBM to agricultural entrymen under the Acts (Pet.App. 145a (citing *Leo Sheep Co. v. United States*, 440 U.S. 668, 682-83 (1979)). Had the Solicitor recognized ambiguity under the Acts, his adherence to the cited rule of construction would have dictated a different substantive opinion consistent with that of the Court of Appeals. Ironically, at the same time that Petitioners argue for binding deference under *Chevron*, like the Solicitor, they are forced to deny the very ambiguity in the Acts that would trigger application of the principle for construing public land laws.

views could not be reconciled with the general purposes of the Acts. Ultimately, because of statutory ambiguity on the question before it, the court concluded that the Solicitor's disregard for the canons of construction of federal land grants could not be sustained.

Chevron does not require judicial deference to agency interpretive decisions that are "arbitrary," unreasoned or in conflict with Congress' purposes in enacting the statutes interpreted by the agency, and, this basis for decision by the court below makes consideration of the *Chevron* format question of no consequence to the court's holding. The Court of Appeals' application of *Chevron* to the 1981 Solicitor's opinion falls well within a court's authority to disregard unreasonable statutory interpretations of administrative agencies.

III. The Court of Appeals Correctly Held That Congress Did Not Convey CBM To Agricultural Entrymen Under the 1909 and 1910 Acts.

Petitioners request review of the court's determination that the 1909 and 1910 Acts are ambiguous and its conclusion that Congress reserved CBM under the Acts. Petitioners insist that in reserving "coal" under the Acts, Congress unambiguously conveyed to non-mineral entrymen the CBM located in underground coal deposits. Petition 23-25. After careful statutory analysis, the court found the Acts to be ambiguous, and applying the canon for construing ambiguous public land laws, the court concluded that Petitioners do not own the CBM located in underground coal deposits reserved by Congress in the

Acts. The Court of Appeals' thorough statutory examination does not require review by the Court.

In approaching the Court, Petitioners can point to no statutory language confirming their contention that Congress specifically intended to convey CBM.[9] Rather, Petitioners assert that Congress reserved only the solid parts of coal. Since CBM extracted from coal and brought to the surface is a gas and not a solid, Petitioners argue that Congress clearly did not intend to reserve CBM when it reserved solid coal. The Court of Appeals found that Petitioners' position is obtained only by "focus[ing] solely on the word 'coal' and totally ignor[ing] what is apparent from the face of the statutes . . . ." (Pet.App. 15a). The court observed that the entire statutory language shows that the grants made under the Acts were " 'non-mineral' " grants to lands " 'classified, claimed, or reported as being valuable for coal' " and that the statutory reservation included not just coal, but also " 'the right to prospect for, mine, and remove the same.' " (Pet.App. 15a (citing 1909 Act)).

After extensive review of contemporaneous definitions and descriptions of coal, the court below could not

---

[9] Congress did not expressly convey a "natural gas" estate to recipients of limited patents under the Acts. The Acts do not contain the word "gas." The Tribe does not claim ownership of gas located in non-coal strata. Such gas is not part of the coal deposits reserved by Congress, even though it may be excess CBM generated millions of years ago by slowly maturing coal deposits. As the Court of Appeals observed, "[a]t issue here is the ownership of CBM trapped in and produced from the coal reservoir." (Pet.App. 18a n.8).

ignore "[t]he common understanding that coal is a heterogenous, complex substance" and refused to "accept [ ] . . . the limitations defendants . . . promote by their characterization of coal as simply 'the solid rock.' " (Pet.App. 17a). In disputing the court's finding of ambiguity, Petitioners simply hide from view repeated references to coal's gaseous and liquid constituents found throughout contemporaneous dictionary and encyclopedia entries for "coal." *See, e.g.*, IV THE AMERICAN CYCLOPAEDIA: A POPULAR DICTIONARY OF GENERAL KNOWLEDGE 726 (G. Ripley and C. A. Dana, eds. 1883) (describing "coal" as "a compound especially of carbon or of decomposed woody matter, with inflammable substances and hydrogen and oxygen gases.").[10]

The Court of Appeals found Petitioners' arguments inconsistent with the purposes of the grant and the reservation under the Acts. Prior to passage of the 1909 Act,

---

[10] The Tribe asserted below and still contends that Congress plainly reserved CBM when it made an in place reservation of "all coal" located in officially designated coal lands. The Tribe steadfastly maintains that detailed examination of the entire texts leaves no reasonable doubt about Congress' unambiguous reservation of CBM under the Acts. *See, e.g., Muscarello v. United States*, 118 S. Ct. 1911, 1919 (1998) ("[M]ost statutes are ambiguous to some degree." (citations omitted)). Textual analysis, together with review of the purposes of the grant and the reservation, removes any doubt or ambiguity as to the Acts' meaning. *See, e.g., Chapman v. United States*, 500 U.S. 453, 463 (1991) (The rule of lenity comes into operation only " 'after a court has seize[d] every thing from which aid can be derived,' [and] it is still 'left with an ambiguous statute.' " (internal quotation omitted) (quoting *United States v. Bass*, 404 U.S. 336, 347 (1971) (quoting *United States v. Fisher*, 6 U.S. (2 Cranch) 358, 386 (1805))).

the nation's public land laws had prohibited agricultural settlement of designated coal lands. This longstanding prohibition, coupled with withdrawals and reclassification of enormous amounts of public land as coal land commencing in 1906, imposed significant hardships upon farmers and ranchers desiring to settle upon the surface of these lands. In the Acts, Congress accommodated the competing mineral resource and agricultural interests through the creation of a coal estate and a non-coal estate. In so doing, Congress had no intention of conveying to agricultural entrymen commercial production rights in underground coal deposits. In fact, upon subsequent disposal of the severed coal estates, the statutes expressly eliminated the sole exception permitting mining by agricultural entrymen of coal deposits for on-site, domestic purposes (initial proviso of 1909 Act (R.App. 1a); initial proviso of 1910 Act § 3 (R.App. 5a)). The new exception promoted by Petitioners, the right to commercial CBM extraction, simply was not and is not remotely associated with the agricultural settlement envisioned by Congress in making the limited grants under the Acts.

Coal mining practices at the turn of the century required ventilation of CBM to avoid the hazards associated with CBM's poisonous and explosive properties (Pet.App. 36a). Consequently, the exercise of dominion and control over CBM was a critical aspect of coal mining. In the absence of any evidence to the contrary, it cannot be assumed that Congress intended to give to agricultural settlers ultimate dominion and control of CBM, a substance that could not be extracted from coal deposits without destroying the coal (Pet.App. 20a-21a).

The Court of Appeals relied not only on Congress' demonstrated awareness and encouragement of technological advances in the use of coal resources, but also upon Congress' use of expansive language to conclude that in reserving "all coal in said lands, and the right to prospect for, mine, and remove the same," Congress' intentions were broad (Pet.App. 29a, 20a n.13), certainly broad enough to include CBM located in underground coal deposits. Having also "found no occasion in which a reservation of a mineral asset to the United States has been treated narrowly to exclude a newly appreciated value associated with that mineral," the court properly resolved any ambiguity on the CBM question in favor of congressional reservation (Pet.App. 31a).

Additionally, Petitioners' statutory interpretation is enormously impractical. *Cf. Burke*, 234 U.S. at 679 (1914) (Congress "was dealing with a practical subject in a practical way . . . ."). Petitioners contend that surface owners own all gases and liquids contained in coal. No party disputes the fact that coal's liquids and gases do not exist in large porous cavities, but rather exist principally within the molecular coal mixture. Instead of using coal deposits as the clear physical boundary of the estates established by these Acts, Petitioners would define the boundaries of their interests based upon the physical state of the molecules in coal after extraction. In contrast to Congress' intentions evidenced by its use of the term "coal deposits," Petitioners would remove any clear, physical demarcation between the coal and non-coal estates. Petitioners, thus, lay claim to any non-solid part of coal that they can force from the "coal deposits" by digging into the coal beds and mechanically altering coal

deposit pressures. Applying Petitioners' ownership theory together with the accommodation doctrine would also permit Petitioners to engage in unbridled *in situ* development of reserved coal, through combustion and distillation, so long as the extracted substance was either gas or liquid. Taken to its logical conclusion, Petitioners' theory would permit them to destroy all of the Tribe's coal. In reserving "all coal in said lands" and the "coal deposits," Congress certainly did not intend such an absurd result.[11]

The Tribe does not take issue with Petitioners' assertion that, under the "rule of accommodation" or some corresponding legal theory of necessity, the Tribe must permit Petitioners to drill through tribal coal to complete

---

[11] In 1913, the Bureau of Mines issued a comprehensive study regarding the dangers of oil and gas drilling through coal strata to reach underlying natural gas deposits. George S. Rice, et al., *Oil and Gas Wells Through Workable Coal Beds*, BUREAU OF MINES BULL. 65 (1913). The Bureau of Mines' study included a map of the nation's known coal areas and known oil and gas areas (R.App. 10a). The map depicts a small portion of the nation's vast coal lands as also containing oil and gas; however, the lands at issue in this case are shown as a coal area only. Under Petitioners' theory, the lands at issue in this case and all other coal areas would have been designated as both coal areas and known oil and gas (CBM) areas, and under the Acts, Congress would have specifically intended to convey the natural gas (CBM) to agricultural entrymen. Recognizing even then that all coal contains CBM, the Department officials of the era simply did not regard CBM as natural gas as Petitioners insist, and, despite its exhaustive treatment of potential conflict between coal owners and gas owners, the Bureau of Mines' study nowhere contemplated the clash in rights now fostered by Petitioners' arguments.

wells in underlying natural gas-producing formations. Petition 14; (Pet.App. 47a). Nor is the Court of Appeals' decision at odds with that rule. By the same token, however, because the Petitioners do not own any constituents of the reserved coal deposits, including the CBM trapped in that coal, application of a "rule of accommodation" to permit Petitioners to complete wells in the Tribe's coal for extraction of coal components is nothing more than trespass. The "rule of accommodation" is not a legal device available to Petitioners to aid in taking the property of others.

Similarly, the Tribe does not take issue with application of a common law "rule of capture," which is a "legal rule of non-liability for (1) causing oil or gas to migrate across property lines and (2) producing oil or gas that was originally in place under the land of another, *so long as the producing well does not trespass.*" 8 WILLIAMS & MEYERS, OIL AND GAS LAW, *Rule of Capture* 983 (1996) (emphasis added). The coal deposits themselves clearly demarcate the underground property boundaries at issue in this case. Petitioners may legally complete a well in an adjacent formation with the hope of draining gas trapped within the Tribe's coal. However, because Petitioners do not own the coal deposits, they may not under the "rule of capture" complete wells in the Tribe's coal, fracture or depressurize the coal, and extract CBM from the coal deposit.

While descriptions of coal's "dissolved or occluded" gases in early 1900 have given way to modern explanations of methane sorption, there is no question that CBM fully permeates and is trapped within underground coal. *Compare* VI ENCYCLOPAEDIA BRITANNICA 575 (11th ed. 1910) (quoted by appeals court (Pet.App. 16a-17a)) *with*

Andrew R. Scott, et al., *Thermogenic and Secondary Biogenic Gases, San Juan Basin, Colorado and New Mexico – Implications for Coalbed Gas Producibility*, 78 AMERICAN ASSOCIATION OF PETROLEUM GEOLOGISTS BULLETIN 1186, 1195 (1994) ("Gases in coal beds are sorbed to the internal structure of coal, which consists of a network of micropores with diameters on the order of nanometers; the density of sorbed methane molecules may approach that of liquid methane."). Amoco's own research scientists, commenting on the unusual bond between CBM and coal's internal surfaces, have observed that "[w]hile some free gas may exist in a coal deposit, the majority of gas is sorbed on the surface of the coal matrix." John P. Seidle and Luis E. Arri (Amoco Prod. Co.), *Use of Conventional Reservoir Models For Coalbed Methane Simulation*, SOCIETY OF PETROLEUM ENGINEERS, Paper No. 21599 at 1 (1990). Contrary to Petitioners' representations to this Court, Petition 7, Amoco's scientists have also concluded that the relationship between coal and CBM readily differentiates coal deposits from conventional gas reservoirs. John P. Seidle (Amoco Tech. Ctr.), *Coalbed Methane: A Unique Resource* (1995).

In sum, the Court of Appeals engaged in an exacting analysis of the Acts. In examining contemporaneous dictionary and encyclopedia entries for the term "coal," references to coal's gaseous constituents were so frequently repeated that the court could not accept Petitioners' narrow meaning for that term. After careful review, the court concluded that the purposes of the Acts, as reflected by their language, historical context and legislative history, were consistent with a reservation of CBM and that a contrary holding would not only be

inconsistent with those purposes, but would also violate the rule for construing public land laws that *"nothing passes except what is conveyed in clear language"* and that "ambiguity or uncertainty in the terms employed [in land grants] should be resolved in favor of the government." (Pet.App. 59a; Pet.App. 11a). Neither the holding of the Court of Appeals nor its statutory analysis in reaching that decision should be reviewed by the Court.

CONCLUSION

For the reasons stated above, the petition should be denied.

Dated December 21, 1998.

Respectfully submitted,

THOMAS H. SHIPPS*
FRANK E. MAYNES
MAYNES, BRADFORD, SHIPPS & SHEFTEL, LLP
P.O. Box 2717
Durango, CO 81302
(970) 247-1755

SCOTT B. MCELROY
ALICE E. WALKER
GREENE, MEYER & MCELROY, P.C.
1007 Pearl Street, Suite 220
Boulder, CO 80302
(303) 442-2021

Counsel for Respondent Southern Ute Indian Tribe

MICHAEL T. MCCONNELL
LONG & JAUDON
1600 Ogden Street
Denver, CO 80218-1414
(303) 832-1122

Counsel of Record

Act of March 3, 1909, 35 Stat. 844

CHAP. 270. – An Act For the protection of the surface rights of entrymen.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person who has in good faith located, selected, or entered under the nonmineral land laws of the United States any lands which subsequently are classified, claimed, or reported as being valuable for coal, may, if he shall so elect, and upon making satisfactory proof of compliance with the laws under which such lands are claimed, receive a patent therefor, which shall contain a reservation to the United States of all coal in said lands, and the right to prospect for, mine, and remove the same. The coal deposits in such lands shall be subject to disposal by the United States in accordance with the provisions of the coal-land laws in force at the time of such disposal, but no person shall enter upon said lands to prospect for, or mine and remove coal therefrom, without previous consent of the owner under such patent, except upon such conditions as to security for and payment of all damages to such owner caused thereby as may be determined by a court of competent jurisdiction: *Provided,* That the owner under such patent shall have the right to mine coal for use on the land for domestic purposes prior to the disposal by the United States of the coal deposit: *Provided further,* That nothing herein contained shall be held to affect or abridge the right of any locator, selector, or entryman to a hearing for the purpose of determining the character of the land located, selected, or entered by

him. Such locator, selector or entryman who has heretofore made or shall hereafter make final proof showing good faith and satisfactory compliance with the law under which his land is claimed shall be entitled to a patent without reservation unless at the time of such final proof and entry it shall be shown that the land is chiefly valuable for coal.

Approved, March 3, 1909.

Act of June 22, 1910, 36 Stat. 583

CHAP. 318. – An Act To provide for agricultural entries on coal lands.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That from and after the passage of this Act unreserved public lands of the United States exclusive of Alaska which have been withdrawn or classified as coal lands, or are valuable for coal, shall be subject to appropriate entry under the homestead laws by actual settlers only, the desert-land law, to selection under section four of the Act approved August eighteenth, eighteen hundred and ninety-four, known as the Carey Act, and to withdrawal under the Act approved June seventeenth, nineteen hundred and two, known as the Reclamation Act, whenever such entry, selection, or withdrawal shall be made with a view of obtaining or passing title, with a reservation to the United States of the coal in such lands and of the right to prospect for, mine, and remove the same. But no desert entry made under the provisions of this Act shall contain more than one hundred and sixty acres, and all homestead entries made hereunder shall be subject to the conditions, as to residence and cultivation, of entries under the Act approved February nineteenth, nineteen hundred and nine entitled "An Act to provide for an enlarged homestead:" *Provided,* That those who have initiated non-mineral entries, selections, or locations in good faith, prior to the passage of this Act, on lands withdrawn or classified as coal lands may perfect the same under th provisions of the laws under which said entries were

made, but shall receive the limited patent provided for in this Act.

SEC. 2. That any person desiring to make entry under the homestead laws or the desert-land law, any State desiring to make selection under section four of the Act of August eighteenth, eighteen hundred and ninety-four, known as the Carey Act, and the Secretary of the Interior in withdrawing under the Reclamation Act lands classified as coal lands, or valuable for coal, with a view of securing or passing title to the same in accordance with the provisions of said Acts, shall state in the application for entry, selection, or notice of withdrawal that the same is made in accordance with and subject to the provisions and reservations of this Act.

SEC. 3. That upon satisfactory proof of full compliance with the provisions of the laws under which entry is made, and of this Act, the entryman shall be entitled to a patent to the land entered by him, which patent shall contain a reservation to the United States of all the coal in the lands so patented, together with the right to prospect for, mine, and remove the same. The coal deposits in such lands shall be subject to disposal by the United States in accordance with the provisions of the coal-land laws in force at the time of such disposal. Any person qualified to acquire coal deposits or the right to mine and remove the coal under the laws of the United States shall have the right, at all times, to enter upon the lands selected, entered, or patented, as provided by this Act, for the purpose of prospecting for coal thereon upon the approval by the Secretary of the Interior of a bond or undertaking to be filed with him as security for the payment of all damages to the crops and improvements

on such lands by reason of such prospecting. Any person who has acquired from the United States the coal deposits in any such land, or the right to mine or remove the same, may reenter and occupy so much of the surface thereof as may be required for all purposes reasonably incident to the mining and removal of the coal therefrom, and mine and remove the coal, upon payment of the damages caused thereby to the owner thereof, or upon giving a good and sufficient bond or undertaking in an action instituted in any competent court to ascertain and fix said damages: *Provided*, That the owner under such limited patent shall have the right to mine coal for use upon the land for domestic purposes at any time prior to the disposal by the United States of the coal deposits: *Provided further*, That nothing herein contained shall be held to deny or abridge the right to present and have prompt consideration of applications to locate, enter, or select, under the land laws of the United States, lands which have been classified as coal lands with a view of disproving such classification and securing a patent without reservation.

Approved, June 22, 1910.

S.2500

One Hundred Fifth Congress
of the
United States of America
AT THE SECOND SESSION

Begun and held at the City of Washington on Tuesday, the twenty-seventh day of January, one thousand nine hundred and ninety-eight

An Act

To protect the sanctity of contracts and leases entered into by surface patent holders with respect to coalbed methane gas.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. PROTECTION OF SANCTITY OF CONTRACTS AND LEASES OF SURFACE PATENT HOLDERS WITH RESPECT TO COALBED METHANE GAS.

(a) IN GENERAL. – Subject to subsection (b), the United States shall recognize as not infringing upon any ownership rights of the United States to coalbed methane any –

(1) contract or lease covering any land that was conveyed by the United States under the Act entitled "An Act for the protection of surface rights of entrymen", approved March 3, 1909 (30 U.S.C. 81), or the Act entitled "An Act to provide for agricultural entries on coal lands", approved June 22, 1910 (30 U.S.C. 83 et seq.), that was –

(A) entered into by a person who has title to said land derived under said Acts, and

(B) that conveys rights to explore for, extract, and sell coalbed methane from said land; or

(2) coalbed methane production from the lands described in subsection (a)(1) by a person who has title to said land and who, on or before the date of enactment of this Act, has filed an application with the State oil and gas regulating agency for a permit to drill an oil and gas well to a completion target located in a coal formation.

(b) APPLICATION. – Subsection (a) –

(1) shall apply only to a valid contract or lease described in subsection (a) that is in effect on the date of enactment of this Act;

(2) shall not otherwise change the terms or conditions of, or affect the rights or obligations of any person under such a contract or lease;

(3) shall apply only to land with respect to which the United States is the owner of coal reserved to the United States in a patent issued under the Act of March 3, 1909 (30 U.S.C. 81), or the Act of June 22, 1910 (30 U.S.C. 83 et seq.), the position of the United States as the owner of the coal not having passed to a third party by deed, patent or other conveyance by the United States;

(4) shall not apply to any interest in coal or land conveyed, restored, or transferred by the United States to a federally recognized Indian tribe, including any conveyance, restoration, or

transfer made pursuant to the Indian Reorganization Act, June 18, 1934 (c. 576, 48 Stat. 984, as amended); the Act of June 28, 1938 (c. 776, 52 Stat. 1209 as implemented by the order of September 14, 1938, 3 Fed. Reg. 1425); and including the area described in section 3 of Public Law 98-290; or any executive order;

(5) shall not be construed to constitute a waiver of any rights of the United States with respect to coalbed methane production that is not subject to subsection (a); and

(6) shall not limit the right of any person who entered into a contract or lease before the date of enactment of this Act, or enters into a contract or lease on or after the date of enactment of this Act, for coal owned by the United States, to mine and remove the coal and to release coalbed methane without liability to any person referred to in subsection (a)(1)(A) or (a)(2).

Speaker of the House of Representatives.

Vice President of the United States and President of the Senate.

Bulletin 65 Petroleum Technology 7

DEPARTMENT OF THE INTERIOR

BUREAU OF MINES

JOSEPH A. HOLMES, DIRECTOR

OIL AND GAS WELLS THROUGH WORKABLE COAL BEDS

PAPERS AND DISCUSSIONS

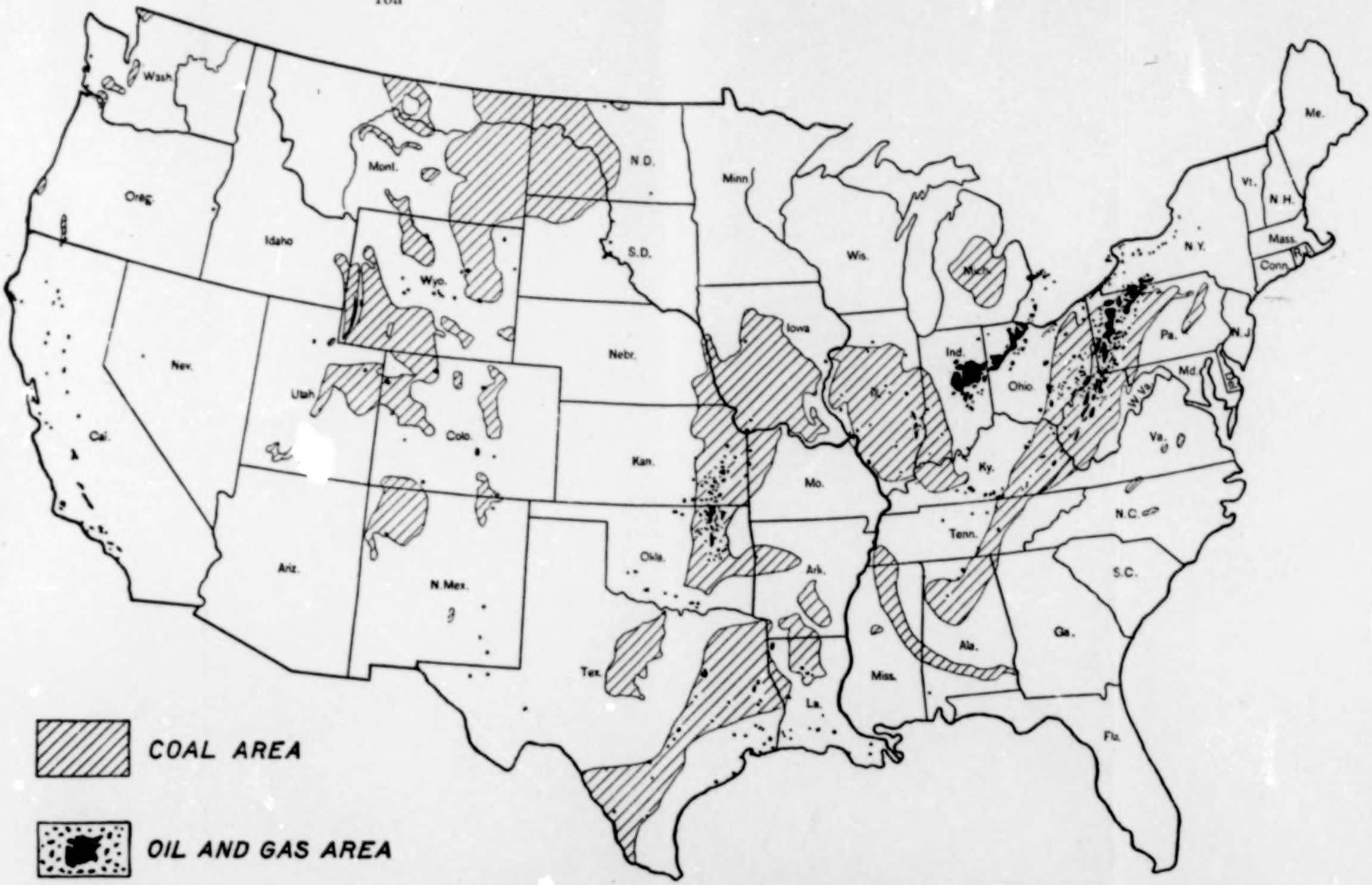
BY

GEORGE S. RICE, O. P. HOOD

AND OTHERS

[SEAL]

WASHINGTON
GOVERNMENT PRINTING OFFICE
1913



78876-12. (To face page 2.)

PLATE 1.—Sketch map of United States, showings area containing coal or lignite and those containing oil or gas.

BEST AVAILABLE COPY